SINAR WANG SDN BHD

v.

NG KEE SENG

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: W-02-701-1998]
26 SEPTEMBER 2001

CONTRACT: *Sale and purchase of property - 'Subject to contract' agreements - Agreement subject to signing of formal sale agreement - Parties disagreed on term to be incorporated in formal agreement - Whether there was a concluded contract between parties notwithstanding use of phrase "subject to contract" in proforma of sale - Pleadings - Equitable remedies*

The plaintiff (respondent herein) intended to purchase a property owned by the defendant (the appellant herein). They exchanged letters ('proforma') setting out the terms in which the sale and purchase was to be carried out. It was not disputed that the proforma used the phrase "subject to contract". The parties then got down to settling a formal sale and purchase agreement. In the course of discussing the terms to be put into the agreement, a problem arose. The plaintiff wanted to convert the lower and upper third floors of the subject property from residential to commercial use. The defendant was not agreeable, and subsequently took the position that there was no contract as the sale was still in negotiations. This led the plaintiff to commence an action against the defendant. The trial judge concluded that there was a concluded and binding contract between the parties. However, he held that it was not a term of the contract that the plaintiff should have conversion of the said floors of the subject property to commercial use. The defendant now appealed against the decision of the trial judge on the ground that the trial judge was wrong in concluding that there was a contract because the proforma was made subject to contract and the parties were still negotiating and were, therefore, not in *consensus ad idem.*

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The words "subject to contract" appearing in a proforma does not mean that there is no concluded contract. The learned judge rightly applied the tests set out in *Lim Keng Siong & Anor v. Yeoh Ah Tee* and *Charles Grenier Sdn Bhd v. Lau Wing Hong* which were plainly binding on him.

It was only after carefully scrutinising the correspondence and attendant circumstances that the learned judge arrived at his findings. Therefore, there was no appealable error either in his reasoning, in his approach or in his conclusion. (pp 689 d, 690 h & 691 a)

[2] If a defendant in a suit for specific relief wishes the trial court to exercise discretion against the plaintiff, he must plead and give particulars of the equitable misconduct complained of. It would be wrong for a trial judge to pronounce upon issues not placed before him in the pleadings. In the present case, the learned judge was right in not considering the issues that were argued before this court. None of the complaints constituting equitable misconduct was ever raised in the defendant's pleadings. The defendant raised only one issue *ie*, that there was no concluded contract. The issues of laches, delay and any other form of misconduct within the "clean hands" doctrine were not raised before the learned judge. He could not thus be blamed for not dealing with them. (pp 691 h, 692 h & 693 a)

[3] The issue of hardship was also not raised before the learned judge. It was an academic point at the present stage. All that the learned judge decreed was specific performance in the general terms of the contract he found to exist. No consequential orders were either asked for or made. However, the plaintiff could resort to O. 44 of the Rules of the High Court 1980. The issue of hardship and other issues that usually arise on a vendor and purchaser summons will no doubt be dealt with in the appropriate way at the appropriate stage. (p 693 b-c)

[4] There was no merit in the plaintiff's argument that the learned judge gave the plaintiff something he had not asked for. Equitable remedies and doctrines are flexible and adaptable to particular circumstances. The court of equity may therefore mould the relief that is to be granted on particular facts. Further, the prayer in the plaintiff's statement of claim for "other relief that this Honourable Court deems fit and just" was sufficient for the exercise of equitable jurisdiction to mould the decree of specific performance to fit the facts as found by the learned judge. (pp 693 e-h & 694 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif (responden di sini) berhasrat untuk membeli hartanah yang dimiliki oleh defendan (perayu di sini). Mereka telah berbalas surat ('proforma') sambil menetapkan terma-terma jual beli tersebut. Pihak-pihak kemudian memulakan urusan memeterai perjanjian jual beli secara rasmi. Masaalah bagaimanapun timbul ketika mereka berbincang mengenai terma-terma perjanjian. Plaintif ingin menukar syarat bahagian bawah dan atas tingkat tiga bangunan berkenaan dari

kegunaannya sebagai tempat kediaman kepada perniagaan. Defendan tidak bersetuju dan berikutnya mengambil pendirian bahawa tiada apa-apa perjanjian telah dimeterai memandangkan penjualan masih di peringkat perbincangan. Ini membawa kepada pemfailan tindakan oleh plaintif terhadap defendan. Yang arif hakim memutuskan bahawa suatu kontrak yang sah telah wujud di antara plaintif dan defendan. Beliau bagaimanapun menyatakan bahawa ianya bukanlah satu terma kontrak bahawa plaintif berhak menukar syarat tingkat tiga bangunan tersebut kepada kegunaan perniagaan. Defendan merayu terhadap keputusan hakim bicara atas alasan bahawa beliau silap dalam memutuskan tentang kewujudan kontrak, oleh kerana proforma adalah tertakluk kepada kontrak dan kerana pihak-pihak masih berunding dan dengan itu tidak ada consensus ad idem.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah):

[1] Perkataan "tertakluk kepada kontrak" yang tertera pada sesuatu proforma tidak bermakna bahawa tidak wujud suatu kontrak yang sah. Yang arif hakim telah dengan betulnya menggunapakai ujian-ujian yang dibentang oleh *Lim Keng Siong & Anor lwn. Yeoh Ah Tee* dan *Charles Grenier Sdn Bhd lwn. Lau Wing Hong* yang sememangnya mengikati beliau. Yang arif hakim telah meneliti surat-surat menyurat dan keadaan-keadaan sekeliling sebelum mencapai keputusannya. Oleh itu, tidak terdapat kesilapan yang boleh dirayui sama ada pada alasan-alasan, pendekatan mahupun rumusan-rumusan beliau.

[2] Sekiranya seorang defendan dalam sesuatu tindakan relif spesifik menginginkan supaya mahkamah bicara melaksanakan budibicaranya terhadap plaintif, beliau hendaklah memplid dan memberikan butir-butir salahlaku ekuiti yang dibantahinya itu. Adalah salah bagi hakim bicara untuk membuat rumusan terhadap isu-isu yang tidak dibangkitkan di hadapannya melalui pliding-pliding. Dalam kes semasa, yang arif hakim adalah betul apabila tidak mempertimbang isu-isu yang dihujahkan dalam mahkamah ini. Tidak satupun bantahan mengenai salah laku ekuiti telah dibangkitkan dalam pliding defendan. Defendan hanya membangkitkan satu isu sahaja iaitu ketiadaan kontrak yang sah. Isu-isu kelengahan dan lain-lain bentuk salah laku yang diliputi oleh doktrin "tangan yang bersih" telah tidak dibangkitkan di hadapan yang arif hakim. Beliau dengan itu tidak boleh disalahkan kerana tidak mempedulikan isu-isu tersebut.

[3] Isu kesukaran juga tidak dibangkitkan di hadapan yang arif hakim. Ia adalah satu perkara akademik pada tahap ini. Apa yang diperintahkan yang arif hakim adalah pelaksanaan spesifik terma-terma umum kontrak yang didapatinya telah wujud. Tiada apa-apa perintah lanjutan telah dipohon ataupun dibuat. Bagaimanapun plaintif boleh menggunapakai A. 44 Kaedah-Kaedah Mahkamah Tinggi 1980. Tidak syak lagi bahawa isu kesukaran serta isu-isu lain yang biasanya berbangkit di dalam saman pembeli dan penjual akan dipertimbang dengan wajarnya di peringkat yang sesuai.

[4] Hujah plaintif bahawa yang arif hakim telah membenarkan sesuatu yang tidak dipohonnya adalah tidak bermerit. Remedi dan doktrin ekuiti boleh berubah untuk disesuaikan dengan sesuatu halkeadaan. Mahkamah ekuiti dengan itu akan memberikan relif dengan berdasarkan fakta-fakta yang wujud. Lagipun, permohonan plaintif dalam penyata tuntutannya untuk "relif-relif lain yang difikirkan wajar dan patut oleh Mahkamah Yang Mulia ini" adalah mencukupi untuk pelaksanaan bidang kuasa ekuiti bagi membuat perintah pelaksanaan spesifik yang sesuai dengan fakta-fakta sepertimana yang didapati oleh yang arif hakim.

Case(s) referred to:

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Dusik v. Newton [1985] 62 BCLR 1 ***(refd)***
Gluckstein v. Barnes [1900] AC 240 ***(refd)***
Hj Mohamed Dom v. Sakiman [1956] 22 MLJ 45 ***(refd)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Lim Keng Siong & Anor v. Yeoh Ah Tee [1983] CLJ (Rep) 231 FC ***(foll)***
Masters v. Cameron [1954] 91 CLR 353 ***(refd)***
Tan Ah Sam v. Chartered Bank [1971] 1 MLJ 28 ***(refd)***
Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 44

For the appellant - Eugene Tan; M/s Eugene Tan & Co
For the respondent - S Selvarajah; M/s Fernandez & Selvarajah

[Appeal from High Court, Kuala Lumpur; Suit No: S1-22-743-1993]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

The defendant is and was at all material times the registered proprietor of a piece of property off Jalan Ipoh. It is a 4½-storey shop house. The ground, first and second floors were used for commercial purposes. They were designated as such at the time the building was constructed. For convenience we will call it "the subject property".

The defendant wanted to sell the subject property. It engaged the services of Rahim & Co., a well-known and reputable firm of estate agents. Eventually, the estate agents introduced the plaintiff as the intending purchaser. At about the same time, Rahim & Co. prepared a letter setting out the terms on which the sale and purchase was to be carried out. The conveyancing Bar calls such a document "the proforma of sale". The proforma in this case was dated 7 July 1992. In accordance with the usual conveyancing practice, a copy of the proforma was sent to the plaintiff and defendant respectively. The defendant signed its copy of the proforma on 10 July 1992. What that meant was that the defendant accepted the offer made to it to buy the property. It is in evidence that the plaintiff also signed his copy of the proforma on the same date. It is not in dispute that the proforma does use the phrase "subject to contract". In fact, those words appear at the very top of the proforma. Since almost the whole of the argument before the High Court centered on the proforma, it is best, we think, that each be reproduced.

Shorn of its formalities, this is how the proforma addressed to the plaintiff reads:

> Dear Mr. Ng,
>
> We are pleased to inform you that our client, M/s. Sinar Wang Sdn Bhd has agreed to sell the above property to you subject to the terms and conditions as set out below:
>
> | | |
> |---|---|
> | 1. Sale Price: | M$750,000-00 (Ringgit: Seven Hundred And Fifty Thousand Only) |
> | 2. Terms of Payment: | (a) The sum of M$75,000.00 (Ringgit: Seventy Five thousand Only) representing ten percent (10%) of the Sale Price shall be paid upon execution of the Sale and Purchase Agreement. Any earnest monies paid shall be included in this sum. This amount is forfeitable in the event the Purchaser shall fail to complete the transaction within the time provided. |

		(b) The sum of M$675,000.00 (Ringgit: Six Hundred and Seventy Five Thousand only) representing the balance of the Sale Price shall be paid within three (3) months from the date of execution of the Sale and Purchase Agreement.
		(c) An extension period of one (1) month shall be provided subject to the balance incurring an interest at the rate of 12% per annum calculated on a daily basis.
	3. Earnest Money:	M$7,500.00 (Ringgit: Seven Thousand Five Hundred only) shall be paid upon acceptance of the terms and conditions as stated in this letter. This amount is forfeitable in the event the transaction is aborted by the Prospective Purchaser prior to the execution of the Sale and Purchase Agreement.
	4. Possession of Property:	Upon receipt of the full payment of the sale price.
	5. Quit Rent & Assessment:	This shall be apportioned at the time of delivery of possession.
	6. Transfer & Stamp fees:	The purchaser shall bear the cost of of transfer and stamp fees including preparation of the Sale and Purchase Agreement. However, each party shall bear their own legal fees.
	7. Specific Terms & Conditions:	a) This sale is made subject to the existing tenancy and all rights of the tenant thereunder being undertaken by the purchaser.
		b) In the event there is no Novation Agreement signed between the Vendor, the Purchaser and the tenant then, the Purchaser shall only be entitled to terminate the tenancy agreement through the Vendor and to pay compensation to the tenant accordingly with the tenancy agreement executed between the Vendor and the Tenant.
		c) The Purchaser shall indemnify the Vendor of any losses, claims made by the tenant in the event of any premature termination of the tenancy agreement made by the Purchaser.

8. Other Terms & Conditions:	a)	The Vendor shall undertake to refund to the purchaser on demand all the deposit sums of monies paid by the purchaser free of interest in the event the Memorandum of Transfer cannot be registered for any reason whatsoever by the Purchaser.
	b)	The Sale and Purchase Agreement shall be executed within twenty one (21) days from the date of the Vendors acceptance.

Please note that this offer is made subject to final acceptance by the Vendor.

Should the above terms and conditions be satisfactory, kindly sign and return the duplicate copy of this letter to us soonest.

The defendant's copy of the proforma again, shorn of its formalities, reads as follows:

We are pleased to inform you that our prospective purchaser, Mr. Ng Kee Seng has agreed to purchase the above property from you subject to the terms and conditions as set out below:

1. Sale Price:		M$ 750,000-00 (Ringgit: Seven Hundred And Fifty Thousand Only)
2. Terms of Payment:	(a)	The sum of M$75,000-00 (Ringgit: Seventy Five thousand Only) representing ten percent (10%) of the Sale Price shall be paid upon execution of the Sale and Purchase Agreement. Any earnest monies paid shall be included in this sum. This amount is forfeitable in the event the Purchaser shall fail to complete the transaction within the time provided.
	(b)	The sum of M$675,000-00 (Ringgit: Six Hundred and Seventy Five Thousand only) representing the balance of the Sale Price shall be paid within three (3) months from the date of execution of the Sale and Purchase Agreement.
	(c)	An extension period of one (1) month shall be provided subject to the balance incurring an interest at the rate of 12% per annum calculated on a daily basis.

3. Earnest Money:	M$ 7,500-00 (Ringgit: Seven Thousand Five Hundred only) shall be paid upon acceptance of the terms and conditions as stated in this letter. This amount is forfeitable in the event the transaction is aborted by the Prospective Purchaser prior to the execution of the Sale and Purchase Agreement.
4. Possession of Property:	Upon receipt of the full payment of the sale price.
5. Quit Rent & Assessment:	This shall be apportioned at the time of delivery of possession.
6. Transfer & Stamp fees:	The purchaser shall bear the cost of transfer and stamp fees including preparation of the Sale and Purchase Agreement. However, each party shall bear their own legal fees.
7. Specific Terms & Conditions:	a) This sale is made subject to the existing tenancy and all rights of the tenant thereunder being undertaken by the purchaser. b) In the event there is no Novation Agreement signed between the Vendor, the Purchaser and the tenant then, the Purchaser shall only be entitled to terminate the tenancy agreement through the Vendor and to pay compensation to the tenant accordingly with the tenancy agreement executed between the Vendor and the Tenant. c) The Purchaser shall indemnify the Vendor of any losses, claims made by the tenant in the event of any premature termination of the tenancy agreement made by the Purchaser.
8. Other Terms & Conditions:	a) The Vendor shall undertake to refund to the purchaser on demand all the deposit sums of monies paid by the purchaser free of interest in the event the Memorandum of Transfer cannot be registered for any reason whatsoever by the Purchaser. b) The Sale and Purchase Agreement shall be executed within twenty one (21) days from the date of the Vendors acceptance.

Should the above terms and conditions be satisfactory, kindly sign and return the duplicate copy of this letter together with the following documents to us soonest.

i) A photocopy of the latest Assessment & Quit Rent receipt.

ii) A photocopy of the existing Tenancy Agreement.

iii) A photocopy of the conversion premium receipt for converting residential to commercial status for the upper floors.

iv) A certified copy of the Company Resolution.

After the exchange of the proforma, the parties got down to the business of settling a formal sale and purchase agreement. In the course of discussing the terms that were to be put into the agreement, a problem arose. It had to do with the conversion of the lower third and upper third floors of the subject property from residential use to commercial use. The plaintiff insisted on the term. But the defendant would have none of it. So a dispute arose. The defendant took the position that there was no contract; that the parties were still in negotiations and that it was not under an obligation to sell and transfer the subject property to the plaintiff.

In September, 1993 the plaintiff sent his letter before action. The plaintiff requested for an opportunity to re-negotiate the terms of the proposed formal agreement. However, it must be borne in mind that the defendant had already declared its unwillingness to complete in its letter dated 31 October 1992. Despite this, writ was issued only on 13 December 1993.

After the usual exchange of pleadings, the trial of the action commenced on 22 April 1998. Decision was handed down on 18 September 1998. The learned judge who tried the action gave judgment for the plaintiff. He decreed specific performance and made the usual consequential order as to costs. It is against that decree of specific performance that the defendant has appealed.

When he came to give his written reasons for his decision, the learned trial judge confined himself to two issues. These were:

(i) Whether there was a concluded and binding contract between the parties?

(ii) Whether it was a term of that contract that the plaintiff shall have conversion of the lower third and upper third floors of the subject property to commercial use?

He answered the first issue in the affirmative and the second issue in the negative. In dealing with the first issue, the learned judge examined the proforma signed by the defendant and the other relevant correspondence before coming to his conclusion that there was a binding contract.

Before us, Mr. Eugene Tan, of counsel for the defendant has sought to argue that the learned judge was wrong for several reasons. We trust that we do counsel no injustice if we summarize his arguments under three broad heads, first, that the learned judge was wrong in concluding that there was a contract because;

(i) the proforma was made subject to contract and

(ii) the parties were still negotiating and therefore were not in *consensus ad idem.*

Second, the whole of the dispute arose because of the plaintiff's insistence upon the term as to conversion. Thirdly, there are several features in this case overlooked by the learned judge that disentitled the plaintiff to the extraordinary remedy of specific performance. We will take each of these in turn.

Was There A Concluded Contract?

The defendant argued that there was no concluded contract. Indeed its entire pleaded case was aimed in that direction. The plaintiff said there was a concluded contract. The learned judge, as we have already said agreed with the plaintiff. We think that the learned judge was correct.

Now, there are three broad categories into which the negotiations between parties to an agreement may fall. These were neatly summarized by Dixon CJ, Mc Tiernan and Kitto JJ in *Masters v. Cameron* [1954] 91 CLR 353.

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

> In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then carry it into execution.

The task that the court should undertake when it is confronted with the question whether there was a binding contract arrived at through correspondence was set out in the following terms by the Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625:

> An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

It does not follow as night follows day that just because the words 'subject to contract' appear in a proforma, that there is no concluded contract. This propostion is well illustrated by the decision of the former Federal Court in *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] CLJ (Rep) 231. That was a much stronger case than the present. The proforma there read as follows:

> I confirm, subject to contract, that the lowest price I am willing to sell the said property is $5.40 per square foot in Singapore currency, the sale and purchase to be completed latest by March 24, 1976. Ten per cent deposit to be paid within the course of the next few days if your buyer Mr. Yeo Ah Tee agrees to the price and the terms.

Following further negotiations, the estate agent in that case wrote the following letter.

> We refer to our telephone conversation this afternoon in which you have kindly accepted our Client's (Mr. Yeo Ah Tee) further offer regarding the above, with vacant possession at a price of $5.20 per square foot for $454,391.60 cents Ringgit, Four Hundred and fifty four thousand three hundred and ninety one dollars and cents sixty only. The sale is to include all buildings, plant and machinery and all ancillary facilities etc. We have received further instructions to inform you that our client has appointed Messrs. Ting Poi Tak & Co. of 30 Jalan Laksamana as his solicitors to deal with all legal matters pertaining to the above sale. Messrs. Ting Poi Tak & Co. will communicate direct with you regarding the sale.

Wan Yahya J (as he then was) held that there was a concluded contract notwithstanding the use of the phrase "subject to contract". His decision was affirmed by a strong Federal Court (Salleh Abbas CJ (Malaya), Abdul Hamid and Seah FJJ). There are two short passages in the judgment of Abdul Hamid FJ which merit reproduction. Both appear at pp. 237 and 238 of the report.

The first passage reads as follows:

> The incontrovertible facts which gave rise to the findings made by the learned judge show very clearly that all the terms and conditions of sale **necessary to conclude a contract** had been agreed upon by the parties of March 3, 1976. There was no stipulation that the contract was not to be binding until execution of a formal contract, indeed to make the formal execution of the contract an essential condition for its conclusion. (emphasis added)

The second passage deals with the use of the phrase "subject to contract" in the correspondence in that case. It reads as follows:

> The letter of March 1, 1976 may well have been a starting point leading to the further events that followed. Too much cannot, we think, be read into the letter other than an expression by the appellants to sell the said land at the price quoted subject of course to a contract to be concluded. It makes sense because no negotiations had yet taken place. It was otherwise after Mr. Chan (PW2) had, pursuant to a negotiation with the appellants on March 3, 1976 secured the agreement of the appellants to sell the said land on terms orally agreed between them.

In upholding Wan Yahya J's judgment the Federal Court relied on a passage from the judgment of Parker J in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 CH 284, at p. 288:

> It appears to be well settled by the authorities that if the document or letters relied as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

The learned judge in the present instance referred to and applied the tests set out in *Lim Keng Siong v. Yeoh Ah Tee (supra)* and *Charles Grenier (supra)*. He was not only entitled but obliged to do so because these are decisions which were plainly binding on him. It is only after carefully scrutinizing the

correspondence and attendant circumstances that the learned judge arrived at his findings. We are therefore unable to detect any appealable error either in his reasoning, his approach or in his conclusion. We would therefore with respect, reject the argument of learned counsel for the appellant that the learned judge had fallen into error.

Was Specific Performance Rightly Decreed?

Mr. Eugene Tan formulated a most attractive argument in clear and precise terms to support his client's case, that even if there was a concluded contract at law, the learned judge ought to have exercised discretion and declined to decree specific performance because of the particular facts before him. In particular, Mr. Eugene Tan has drawn the following matters to our attention, which he says were overlooked by the learned judge:

(i) It is the plaintiff who was to be blamed for the state of affairs that persisted immediately before the issue of the writ. If there had been no insistence on the term as to conversion, there would had been smooth sailing to completion. By giving the plaintiff specific performance, the trial judge had afforded him a second bite of the proverbial cherry.

(ii) The plaintiff lay in slumber for a considerable time even after the defendant had said there was no contract.

(iii) That the decree of specific performance imposes hardship upon the defendant.

(iv) There was no alternative prayer in the plaintiff's statement of claim for a varied decree of specific performance. The plaintiff had sought specific performance of a contract that included a term as to conversion. Without an amendment to his pleading, he had obtained specific performance of a different contract, namely, one that did not have the aforesaid term.

We find it convenient to take the first two matters together. In a gist, they relate to what has now come to be commonly called equitable misconduct. This compendious phrase encompasses the various discretionary considerations that touch upon the conduct of a party seeking relief. It also, for certain limited purposes, includes any delay by a claimant for specific relief to either institute or prosecute his claim.

If a defendant in a suit for specific relief wishes the trial court to exercise discretion against the plaintiff, he must plead and give particulars of the equitable misconduct complained of. It would be wrong for a trial judge to pronounce upon issues not placed before him in the pleadings either in their original form or by way of amendment. The point is well settled by numerous authorities and we find reference to two of these to be sufficient.

In *Haji Mohamed Dom v. Sakiman* [1956] 22 MLJ, p. 45, the plaintiff claimed specific performance of an agreement for the sale of a piece of land. The agreement included a provision for the payment of penalty in the event of non-transfer. The defendant pleaded forgery. The learned trial judge held the document to be genuine. However, he went on to hold that the agreement was not a true contract for the sale of land but was a money lending transaction. He therefore dismissed the plaintiff's claim. The plaintiff appealed. The Court of Appeal reversed. It was held that since there was no allegation of moneylending in the pleadings, the judge had gone wrong in dealing with that issue.

Mathew CJ at p. 45 said:

> Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial Judge had no alternative but to order specific performance of the agreement or to award damages. I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must placed on the record, which in this case they were not, *Blay v. Pollard & Morris* [1930] KB 628.

Again in *Tan Ah Sam v. Chartered Bank* [1971] 1 MLJ 28. At p. 31, Suffian FJ said:

> Mr. Abraham for the Plaintiff before us complains that the bank was negligent in delaying to inform the Plaintiff of what it had done. There was evidence that the letter received by the Plaintiff on the 15th had been typed on the 9th, which implies that even as early as the 9th the bank had decided to return the Plaintiff's cheque and yet they did not post it until the 13th, and it is said, that if the bank had not been negligent and had posted the letter on the 9th, the day it was typed, it would have reached the Plaintiff on the 11th (a Monday) and he would have made other arrangements to put his account in funds in time to meet the cheques he had issued. **I think that this argument raises a new issue and we should not consider it**. The pleadings do not mention negligence, there was naturally no evidence led by the bank to rebut it and there was no mention of it in Mr. Kok's address in the lower court. (emphasis added)

Applying these pronouncements made by distinguished judges to the facts of the present case, we are of the opinion that the learned judge was quite right in not considering the issues that were argued before us when this appeal came up on Monday (23 September 2002) of this week. None of the complaints constituting equitable conduct were ever raised in the defendant's pleadings. As we have already said the defendant targeted only one issue: there was no

concluded contract. That was the only issue put before the judge. Neither laches nor delay nor any other form of misconduct falling within the "clean hands" doctrine were ever placed on record. They were therefore not issues raised before the learned judge. He therefore cannot be blamed for failing to deal with them.

Hardship

Turning to the third point; issue of hardship, this is a matter also not put on record before the learned judge. It is an academic point at this stage. All that the learned judge has decreed is specific performance in general terms of the contract he found to exist. No consequential orders were either asked for or made. The plaintiff has a way to go. He has to resort to the procedure set out in O. 44 of the Rules of the High Court 1980. The issue of hardship and other issues that usually arise on a vendor and purchaser summons will no doubt be dealt with in the appropriate way at the appropriate stage. Any comment we make now will be entirely gratuitous and may only produce a prejudicial effect one way or the other. We therefore, choose the line of least resistance and will say nothing about it.

We now address the fourth point. Mr. Tan's argument that the learned judge gave the plaintiff something he had not asked for overlooks two fundamental principles. A Court of Equity exercises its jurisdiction not in a straight jacketed or inflexible fashion. The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable remedies and doctrines are therefore flexible and adaptable to particular circumstances. The Court of Equity may therefore mould the relief that is to be granted on particular facts. So, for example if rescission appears to be the inevitable or indeed the only remedy in a given case, a court of equity may decline to order rescission and instead may order equitable compensation by way of adjustment. The cases of *Gluckstein v. Barnes* [1900] AC 240 and *Dusik v. Newton* [1985] and 62 BCLR 1 amply illustrate the malleability of equitable remedies to fit particular circumstances. We therefore find no merit in Mr. Tan's argument.

There is another reason why we would reject the submission of counsel. In his statement of claim the plaintiff also sought a prayer for "other relief that this Honourable Court deems fit and just." Now these are not empty words. As Salleh Abbas FJ observed in another context in *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190:

a In any case, prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning.

In our judgment the formulation in the plaintiff's statement of claim quoted above is sufficient for the exercise of equitable jurisdiction to mould the decree b of specific performance to fit the facts as found by the learned judge.

The Upshot

We have considered the plaintiff's complaints very carefully. We have scrutinized the learned judge's judgment and tested it against the material available in the record provided to us. Having done so, we are entirely satisfied c that there is no ground on which the learned judge may be justifiably criticised. Indeed the case for the plaintiff at this stage was so clear that we found no necessity to trouble his counsel for a response to the defendant's argument. This appeal accordingly fails. It is dismissed.

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